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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Docket No. 850

VICTOR PORCELLI, FRANCIS BIGLEY, ARTHUR SHAPIRO, ALLAN M. COHN, HELEN R. JUSTIN, MAXINE F. EDELSTEIN, ROBERT J. HICKEY, WILLIAM J. DUNNE, JR., WILLIAM C. LARUSSO and JOSEPH CHAGNON,

Petitioners,

vs.

FRANKLYN TITUS, Superintendent of Schools of the City of Newark, THE BOARD OF EDUCATION OF NEWARK IN THE COUNTY OF ESSEX,

Respondents,

and

CHARLES HAYNES,

Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

INTERVENOR'S BRIEF IN OPPOSITION

FRANK ASKIN,
180 University Avenue,
Newark, New Jersey, 07102,

STEPHEN NAGLER,
EMIL OXFELD,
American Civil Liberties Union of New Jersey,
42 Academy Street,
Newark, New Jersey, 07102,

Counsel for Intervenor-Respondent.

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Statement of Question Presented

I. Whether the Decision of the Third Circuit Court of Appeals Conflicts With the Decisions of Other Circuit Courts?

Statement of the Case

In the interest of brevity Intervenor will not here restate the history of this case and extensive evidence in the record below, which has been well reviewed in the opinions of the District Court, *Porcelli* v. *Titus*, 302 F. Supp. 726 (D. N. J. 1969) (included as Appendix C to the Petition, at p. 10a *et seq.*) and of the Third Circuit (included as Appendix A to the Petition, p. 1a *et seq.*). The central findings below were that:

> "A fair evaluation of the record supports the conclusion that the promotional lists were suspended and the examination system abolished, not simply to appoint Negroes to promotional positions, but to obtain for these positions qualified persons, white or black, whose qualifications were based on an awareness of, and sensitivity to, the problems of educating the Newark school population . . ." 302 F. Supp. at 732-33, Petition p. 23a.

and that

> "The Court is satisfied that in abolishing the examination procedure, there was no intention on the part of the Board to discriminate against white persons or exclude them from consideration for promotional positions. No inference of any such intention can be gleaned from the record. The testimony of several of the witnesses . . . shows that, despite a desire to provide an avenue for the appointment of more Negro administrators, the ultimate objective of the Board was to promote those persons most qualified to suit the needs of the Newark school system. There is nothing in the record to indicate that the Board was attempting to

appoint Negroes in numbers proportionate to the school population." 302 F. Supp. at 733, Petition p. 25a.

The District Court based its decision in part on the testimony of the Superintendent of the Newark's school system:

> "Defendant Titus testified that 'the examination procedure as it has existed since roughly 1953 did not in 1968 necessarily produce the best people for responsible positions of leadership. * * * I felt that in 20 years, 25 years that had elapsed since the procedure was first or originally modified or developed the conditions in the City had changed, educational philosophy had changed. There was a high (sic) premium on sensitivity than had existed hitherto. And for that reason I welcome the opportunity of reviewing the whole procedure. * * * Sensitivity, as I see it, is that element of a person's personality which makes him aware of the problems that are unique to the ghetto, unique to the circumstances surrounding being a member of a minority group, sensitive to educational needs that go (sic) out of the deprived conditions in many of our—most of our school neighborhoods. * * * As I see it, and I see it very clearly in my own mind, anybody who is in a position of leadership today in a city like Newark has to be able to identify, has to be able to understand.' In fact Superintendent Titus testified that he never equated 'high standing on an examination procedure with the ability to successfully administer a school.'" *Porcelli* v. *Titus*, 302 F. Supp. 726, 732, Petition p. 21-22a.

The Court also relied on the expert testimony of Dr. Richard Trent, Associate Professor of Urban Education, and Executive Officer of the Education Opportunity Program at Brooklyn College, that "if you want significant change in the school performance of ghetto population, it is highly advisable to involve as much as you can competent black professionals * * *." Dr. Trent further testified that the presence of a black man in authority is evidence to the children that if they study, they, too, can achieve. In addition, he stated that it is easier for a Negro to discipline ghetto children, and for a Negro to involve Negro parents in the educational process. *Porcelli* v. *Titus,* 302 F. Supp. 726, 733, Petition p. 24a.

The Court also found that at the time of the contested Board action appointing black principals: 1) the percentage of Negroes in the Newark school system was 72.5%, 2) of the 136 principal and vice principal positions, only 3 were held by Negroes, 3) that there had only been 4 Negro principals and vice principals and 1 Negro departmental chairman in the history of the Newark School System. *Porcelli* v. *Titus,* 302 F. Supp. 726, 731, Petition, p. 19a-20a.

Reason fc Denying the Writ

The decision rendered below is not in conflict with the holdings of other circuits.

The sole reason given by Petitioner in support of granting a writ of certiorari is that the decision rendered by the Court of Appeals for the Third Circuit is in conflict with holdings of other circuits. This contention is without merit.

The District Court considered these allegedly conflicting cases, *Wall* v. *Stanley County Board of Education,* 378 F.

2d 275 (4th Cir. 1967); *Kelley* v. *Altheimer,* 378 F. 2d 483 (8th Cir. 1967); *Rolfe* v. *County Board of Education,* 391 F. 2d 77 (6th Cir. 1968); and *Smith* v. *Board of Education,* 365 F. 2d 770 (8th Cir. 1966), and correctly noted that "these cases involved factual situations completely different from the facts in the case at bar." 302 F. Supp. at 733, Petition p. 25a.

These cases are essentially concerned with the following factual patterns: (1) School districts which formerly existed as dual school systems for the respective races prescribed by law; (2) local school boards institute "freedom of choice" plans for student in an effort to comply with *Brown* v. *Board of Education,* 347 U. S. 483, but fail to integrate faculties and staffs; (3) a sizeable number of black students choose to go to the heretofore all-white school; (4) the number of black teachers necessary to administer the black schools is reduced because of decreased student enrollment resulting from the transfers; a number of tenured black teachers are summarily dismissed; and (5) these dismissed black teachers bring a civil rights action alleging that the desegregation plans are legally deficient in that they fail to integrate faculty, and that they as plaintiffs were denied an opportunity to compete for the additional posts available in the primarily white schools because of their race. The courts accede to their arguments stating that, in this context, race is an impermissible consideration in the selection or assignment of teachers in a public school system.

Kemp v. *Beasley,* 389 F. 2d 178 (8th Cir. 1968) and *Board of Public Instruction* v. *Braxton,* 326 F. 2d 616 (5th Cir. 1964), also allegedly in conflict with the decisions below, are also factually distinguishable. In *Kemp* the court rejected the desegregation plan of an Arkansas school district, because the plan did not provide for cor-

recting racial imbalance in school faculties. *Kemp* v. *Beasley, supra* at 188. In *Braxton,* the Court upheld an order forbidding continued assignment of teachers on a racial basis. Racial classifications could not be used to assign black teachers to predominately black schools, thereby perpetuating segregation faculties. *Kemp* v. *Beasley, supra* at 190; *Board of Public Instruction* v. *Braxton, supra* at 620-21.

The Courts in these cases found the purposes for which the racial classifications were made to be objectionable, for race was being used to impose a burden on the black race by maintaining dual school systems which artificially excluded Negro teachers from teaching at formerly all white schools. Race was arbitrarily and invidiously the sole basis for the exclusion. No legitimate governmental aims for said exclusion existed. In this context, race is an "impermissible criterion."

In sharp distinction the Newark Board endeavored to integrate its faculty, and to further the legitimate governmental aim of improving the quality of school education.

Moreover the above cases relied upon by Petitioner voice no opinion on whether race can be considered in integrating principal staffs, and indeed clearly imply that it can be. As such, these cases are consistent with Intervenor's position and the decision below in this case.

The remaining circuit cases cited by Petitioner as being in conflict with the decision below, *Downs* v. *Board of Education,* 336 F. 2d 988 (10th Cir. 1964); *Springfield School Committee* v. *Barksdale,* 348 F. 2d 261 (1st Cir. 1964) represent a different strain—a reluctance of certain courts to require, as a constitutional mandate, that school boards take affirmative action to correct de facto racial

imbalance which is innocent in its origins. These cases, however, do not forbid *voluntary* affirmative action by a school board to redress deprivation based on racial imbalance.

In the *Downs* case it was held that a pattern of de facto segregation resting not on discriminatory practices but on a reasonable application of educational principles did not impose an affirmative duty of racial balancing on the school board. In the *Barksdale* case the court refused to order correction of de facto segregation in a situation where the school board had already established the goal of eliminating racial imbalance within the framework of effective educational procedures. In neither case did the courts say the Constitution forbids the voluntary affirmative action to correct racial imbalance that is the present case. To the contrary *Barksdale* is quoted with approval by the Third Circuit in the present case. *Porcelli* v. *Titus,* Petition p. 6a.

Courts have uniformly refused to enjoin voluntary state actions to reduce de facto racial imbalance. *Offerman* v. *Nitkowski,* 378 F. 2d 22, 24 (2nd Cir. 1967). *Wanner* v. *County School Board of Arlington County, Va.,* 357 F. 2d 452, 455 (4th Cir. 1966); *Tometz* v. *Board of Education,* 39 Ill. 2d 593, 237 N. E. 2d 498, 501; *Booker* v. *Board of Education of Plainfield,* 45 N. J. 161, 212 A. 2d 1 (1965); *Fuller* v. *Volk,* 230 F. Supp. 25 (D. N. J. 1964); *Morean* v. *Board of Education of Town of Montclair,* 42 N. J. 237, 200 A. 2d 97 (1964); *School Comm.* v. *Board of Education,* 352 Mass. 693, 227 N. E. 2d 729 (1967), appeal dismissed, 389 U. S. 572 (1968); *Addabbo* v. *Donovan,* 16 N. Y. 2d 619, 261 N. Y. S. 2d 68, 209 N. E. 2d 112 (1965); *Vetere* v. *Allen,* 15 N. Y. 2d 259, 258 N. Y. S. 2d 77, 206 N. E. 2d 174 (1965); *Balaban* v. *Rubin,* 14 N. Y. 2d 193, 250 N. Y. S. 2d 281, 199 N. E. 2d 375, cert. denied, 379 U. S. 881, 85 S. Ct. 148.

Petitioner has not cited one case where voluntary state action to reduce racial imbalance or to integrate a school system has been enjoined.

Similar support for, rather than conflict with the decision of the Third Circuit, is furnished by the last circuit decision cited by Petitioners. In *Offerman* v. *Nitkowski*, 378 F. 2d 22 (2nd Cir. 1967) parents sought an injunction against implementation of a school board plan to correct de facto racial imbalance in the Buffalo system. The court refused to interfere with the board's desegregation plan, saying:

> "Consideration of race is necessary to carry out the mandate in *Brown*, and has been used, as noted, in cases following *Brown*. Where its use is to insure against, rather than to promote deprivation of equal educational opportunity, we cannot conceive that our courts would find that the state denied equal protection to either race by requiring its school boards to act with awareness of the problem." 378 F. 2d at 24-25.

Finally, the attempt by Petitioners to factually demonstrate racial discrimination has been rejected below, and this Court should defer to the factual findings of the lower courts.

CONCLUSION

The voluntary actions taken by Respondent school board were a conscientious effort to overcome a longstanding racial imbalance in school administration which has resulted in insensitivity and serious deprivations of educational opportunity for thousands of disadvantaged black children. It would be a cruel irony if the principles of the Fourteenth Amendment developed in the cited cases

to enforce the right of the black man to equality before the law were to be used as Petitioner demands, to bar the achievement of equality by the black man in this case.

It is respectfully urged that a writ of certiorari be denied.

Respectfully submitted,

FRANK ASKIN,
180 University Avenue,
Newark, New Jersey.

STEPHEN NAGLER,
EMIL OXFELD,
American Civil Liberties Union of New Jersey
45 Academy Street
Newark, New Jersey

Counsel for Intervenor-Respondent.